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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 509

FRANK MORGAN, ADMINISTRATOR OF THE ESTATE OF WILLIAM NICHOLAS,

Petitioner.

vs.

FRANK T. HINES, AS ADMINISTRATOR OF VETERANS' AFFAIRS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

WARREN E. MILLER,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Petitioner, Frank Morgan, administrator of the estate of William Nicholas respectfully prays certiorari to review a decision of the United States Court of Appeals for the District of Columbia, affirming a final order (R. 13) of the District Court sustaining respondent's demurrer and dismissing his petition for a writ of mandamus.

Petitioner asserts the court below has:

1. Decided a question of general importance of substance relating to certain statutes of the United States, which has not been, but should be, settled by this Court;

2. Has not given proper application to rights conferred upon petitioner by the Fifth Amendment to the Constitution of the United States, and

3. Has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Summary Statement of the Matter Involved.

This case is for consideration of the appropriate pleadings in a mandamus suit filed July 3, 1933, upon the question of law presented by the ruling of the court below upon respondent's demurrer (R. 12) to petitioner's amended replication (R. 8-12) when it affirmed (R. 21) the action of the District Court (R. 13) in sustaining respondent's demurrer and dismissing the petition.

Petitioner, upon being appointed administrator of the estate of William Nicholas, deceased on March 7, 1932 (R. 3) filed claim with the United States Veterans' Administration for the payment of insurance benefits (R. 1) due his decedent's estate, the decedent having died on September 4, 1926 (R. 10) while his insurance was in force. On October 27, 1932 the Insurance Claims Council of the United States Veterans' Administration (R. 10) found as a fact, pursuant to authority duly delegated to it by regulations duly promulgated in accordance with law that William Nicholas, hereinafter referred to as the insured was totally and permanently disabled within the meaning of his war risk insurance contract from December 5, 1918, the date of his discharge from the military service of the United States with a surgeon's certificate of disability. This body was the only agency charged by law and regulations duly promulgated pursuant to law with the responsibility of determing the existence of total and permanent disability for insurance purposes. Again on September 25, 1933 and again on Sep-

tember 15, 1934 (R. 10) the Insurance Claims Council affirmed its previous action, holding the evidence sufficient to constitute total and permanent disability while this insurance was in force; (R. 1). *No Appeal was taken from this decision.* (R. 9).

However, the Administrator of Veterans' Affairs refused to allow this claim to be paid (R. 10-11).

Petitioner, having been appointed administrator on March 7, 1932 (R. 3) could not timely file claim under Section 19, World War Veterans' Act, as amended (c. 849, 46 Stat. 991) so he filed suit (R. 12) to compel respondent to pay insurance benefits.

Respondent's demurrer filed June 9, 1938 alleged the petition and amended replication failed to recite proper grounds for the issuance of a writ of mandamus and that the petition sought to control respondent's exercise of discretion.

The District Court on January 19, 1939 dismissed the petition. The United States Court of Appeals for the District of Columbia on July 15, 1940 affirmed the judgment of the District Court.

Basis of the Court's Jurisdiction.

Jurisdiction of the Supreme Court of the United States is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (Chap. 225, 43 Stat. 938, 28 U. S. C. A. 347) and Par. 5 (b) and 5 (c) of Rule 38 of this Court.

The order of the United States District Court was entered January 19, 1939 (R. 13) the opinion of the United States Court of Appeals for the District of Columbia upon appeal timely prosecuted, was rendered on July 15, 1940 (R. 18-21).

Questions Presented.

1. Did Section 19, World War Veterans' Act, 1924 as amended deprive petitioner of his right to file a common law action of mandamus authorized by Sections 211 to 220 inclusive, Title 24 of the District of Columbia Code as consolidated and codified to March 4, 1929 in force at the time this suit was filed on July 3, 1935 when no concurrent right existed to file suit under said Section 19 at the time such mandamus suit was filed?

2. Were petitioner's rights to war risk insurance as protected by the 5th Amendment to the Constitution of the United States violated?

3. Could the court below properly consider, upon Respondent's demurrer to petitioner's replication, the affirmative defense set forth by Respondent in his answer?

Reasons Relied Upon for Allowance of Writ.

Petitioner shows that the court below in its opinion herein complained of misconstrued certain statutes of the United States, to-wit, the effect of Section 19, World War Veterans' Act, 1924 as amended, (c. 849, 46 Stat. 991) upon Sections 211 to 220 inclusive, Title 24 of the Code of the District of Columbia as consolidated and codified to March 4, 1929, did not properly apply the Fifth Amendment to the Constitution of the United States or the decision of this Honorable Court in the case of *Lynch* and *Wilner* vs. *United States*, 292 U. S. 571, 78 L. Ed. 1434; has so far sanctioned a departure from the accepted and usual cause of judicial proceedings as to call for an exercise of this court's power of supervision, and has decided an important question of Federal law which has not been, but should be, settled by this court.

Unless the remedy of mandamus is available here, this petitioner is without redress respecting his vested property rights because suit under Section 19, World War Veterans' Act, 1924 as amended could never have been filed by this petitioner because at the time petitioner was appointed administrator of this estate on March 7, 1932 (R. 3), the time for filing claim in order to sue under Section 19, World War Veterans' Act, 1924 as amended (c. 849, 46 Stat. 991) had already expired on July 3, 1931.

Administrative consideration of claims, however, is not limited by statute so far as the date of filing such claims is concerned, the statute of limitations applying only to the bringing of suit. *Jenkins* v. *United States,* 86 F. (2d) 123.